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No. 00-746

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, *et al.*,

*Petitioners,*

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF OF RESPONDENTS GILA RIVER INDIAN COMMUNITY, NAVAJO NATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND SHOSHONE-BANNOCK TRIBES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Section 301(d) of the Clean Air Act ("CAA"), 42 U.S.C. §7601(d), App. 146a-147a, requires the U.S. Environmental Protection Agency ("EPA") to promulgate a rule specifying the provisions of the CAA for which it is appropriate to treat Indian tribes in the same manner as states under the Act, and authorizes such treatment "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Was the U.S. Court of Appeals for the D.C. Circuit correct in upholding EPA's final rule, which is subject to the "arbitrary and capricious" standard of review, where EPA found:

1. that CAA §7474, App. 141a-146a, which by 1977 already provided that tribes were the only authorities who could "redesignate" lands within "reservations," should be interpreted under §7601(d) (added to the CAA in 1990) to allow tribes to redesignate not only formal reservations and trust lands but also "other areas within the tribe's jurisdiction"; and

2. that CAA §7601(d), which clearly distinguishes between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction," constitutes a delegation of authority to tribes to regulate air quality within the reservation, especially since the legislative history supports this interpretation and the CAA's purpose of achieving and maintaining air quality is best accomplished by allowing tribes regulatory authority over their entire territories rather than subjecting those territories to differing regulatory regimes?

## LIST OF PARTIES

1. The following were petitioners in the proceeding in the U.S. Court of Appeals for the D.C. Circuit, and join in this petition:

   In 98-1203, the National Association of Manufacturers, the Michigan Chemical Council, the Timber Producers Association of Michigan and Wisconsin, Inc., and the Rhinelander Area Chamber of Commerce, Inc.

   In 98-1207, Salt River Project Agricultural Improvement and Power District and Public Service Company of New Mexico.

2. The following were petitioners in the D.C. Circuit proceeding, and do not join in this petition:

   In 98-1196, Arizona Public Service Company.

   In 98-1203, the American Forest & Paper Association.

   In 98-1206, the National Mining Association.

   In 98-1207, Nevada Power Company and Tucson Electric Power Company.

   In 98-1208, Oklahoma Gas and Electric Company.

   In 98-1209, the State of Oklahoma.

3. The following was an intervenor on behalf of petitioners in the D.C. Circuit proceeding, and joins in this petition:

   The State of Michigan

4. The following was an intervenor on behalf of petitioners in the D.C. Circuit proceeding, and does not join in this petition:

   Central and South West Services, Inc.

5. The following was respondent in the D.C. Circuit proceeding, and is respondent in this proceeding:

   The U.S. Environmental Protection Agency.

6. The following were intervenors on behalf of respondent in the D.C. Circuit proceeding, and are respondents in this proceeding:

   The Gila River Indian Community, the Navajo Nation, the Salt River Pima-Maricopa Indian Community and the Shoshone-Bannock Tribes.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Gila River Indian Community, Navajo Nation, Salt River Pima-Maricopa Indian Community and Shoshone-Bannock Tribes respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the D.C. Circuit in this case. That decision is reported as *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (2000), *reh. and reh. en banc denied* (July 12, 2000), App. 1a, 135a, 137a.

### STATEMENT OF THE CASE

This case involves review of a rule issued by the Environmental Protection Agency ("EPA") pursuant to the 1990 Amendments to the Clean Air Act ("CAA"). On February 12, 1998, EPA promulgated the Tribal Authority Rule ("TAR"), 63 Fed. Reg. 7254, App. 50a, in order to comply with CAA §301(d), 42 U.S.C. §7601(d), App. 146a. Section 7601(d)(1)(A) authorizes the EPA Administrator to "treat Indian tribes as States" under the CAA, providing that tribes may, but are not required to, apply to EPA for approval to manage CAA programs. Section 7601(d) also requires EPA to promulgate a rule (the TAR) specifying the provisions of the CAA for which it is appropriate to treat tribes in the same manner as states, and sets forth the circumstances under which such treatment is authorized. In their petition for a writ of certiorari, petitioners question two aspects of the TAR: first, EPA's finding that tribes may make "redesignations" for all areas within their jurisdiction, not just for reservation areas, and second, EPA's interpretation of §7601(d) as a statutory delegation of authority to tribes to implement air quality pro-

grams within reservations. Petitioners appear to subsume within these two issues the question of whether the term "reservation" includes all lands held in trust for tribes, including trust lands that have not formally been declared reservations.

**Proceedings Below**

Thirteen parties filed six petitions for review challenging the TAR on six different grounds, itemized in the D.C. Circuit's opinion, 211 F.3d at 1283-84, 1286-87, App. 3a, 9a-10a; the petitions were consolidated, and two additional parties intervened in the consolidated proceeding on behalf of petitioners. Since the TAR is a "nationally applicable regulation," the petitions were required to be filed in the D.C. Circuit. 42 U.S.C. §7607-(b). The four Indian tribes filing this brief intervened on behalf of EPA. Two days before oral argument, petitioners also filed a motion for vacatur and remand of a portion of the TAR. The D.C. Circuit upheld the TAR on all grounds, stating that "We find petitioners' challenges to be mostly meritless." 211 F.3d at 1284, App. 3a. The decision was unanimous with regard to all issues except the delegation issue referred to above. Even on this issue, the dissenting judge agreed that "the 1990 Amendments do contain an express delegation of authority over fee lands and rights of way" and disagreed only as to which provision of the CAA created that delegation. 211 F.3d at 1301, App. 40a.

Petitions for rehearing and rehearing *en banc* were denied. Under Fed. R. App. P. 35(a), an *en banc* rehearing "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." No member of

the court requested a vote as to whether the case should be reheard *en banc*. App. 138a. Of the fifteen parties who challenged the TAR in the D.C. Circuit, only seven have petitioned this Court for a writ of certiorari.[1] Arizona Public Service Company ("APS"), the named petitioner below, is not one of the parties petitioning this Court; petitioners have replaced APS in the caption with the State of Michigan, an intervenor below.[2]

**Statutory and Regulatory Background**

The "treatment as a state" provision in §7601(d) is by no means unique. On the contrary, the provision is one of several provisions added to the Safe Drinking Water Act ("SDWA"), Clean Water Act ("CWA") and CAA in the past 15 years providing a regulatory and enforcement role for tribes under these environmental statutes. *See* Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339; Clean Water Act Amendments of 1987, Pub. L. No. 100-4; Clean Air Act Amendments of 1990, Pub. L. No. 101-549.[3] In particular, "treatment

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[1] The State of Oklahoma voluntarily dismissed its petition for review of the TAR after EPA issued guidance clarifying application of the TAR in Oklahoma.

[2] Although the State of Michigan appears in the caption, petitioners' counsel of record is in fact counsel for the two electric utility petitioners in this case and not for Michigan. Moreover, no Michigan tribes have intervened in this proceeding, and no Michigan tribes have received CAA §105 eligibility or other approvals for CAA programs.

[3] Such amendments were enacted as a result of policies regarding tribal self-government and government-to-government consultation and in light of a growing awareness of principles of federal Indian law. *See, e.g.*, S.R. No. 101-228 at 79, 1990 U.S.C.C.A.N. 3385, 3465.

as a state" provisions were added to the SDWA and CWA several years prior to the addition of §7601(d) to the CAA. SDWA §1451, 42 U.S.C. §300j-11 (added in 1986); CWA §518(e), 33 U.S.C. §1377(e) (added in 1987). All three of these "treatment as a state" provisions authorize federally recognized tribes to implement programs under the respective statute, subject to the approval of EPA and as long as the tribe meets three criteria: the tribe must (1) have a governing body "carrying out substantial governmental duties and powers;" (2) demonstrate jurisdiction with regard to the area over which the tribe intends to implement the environmental program in question; and (3) have the capability to implement that program.

The only significant difference between the three "treatment as a state" provisions relates to the wording of the jurisdictional requirement. Whereas the SDWA provides generally for tribal regulation "within the area of the Tribal Government's jurisdiction," 42 U.S.C. §300j-11, and the CWA provides specifically for tribal regulation "within the borders of an Indian reservation," 33 U.S.C. §1377(e), the CAA provides for both, declaring that a tribe may regulate "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction," 42 U.S.C. §7601(d)(2)(B). This distinction is the basis for the statutory delegation discussed by EPA in the TAR, upheld by the D.C. Circuit, and raised here by petitioners.

Not surprisingly, in light of this statutory background, EPA's TAR under the CAA is in many respects identical to the "treatment as a state" rules issued by EPA under both the CWA and the SDWA.[4] All these rules lay out

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[4] *Compare* 59 Fed. Reg. 43956 (Aug. 25, 1994) (proposed TAR), 63 Fed. Reg. 7254 (Feb. 12, 1998) (final TAR); 54 Fed.

[footnote continued]

essentially the same criteria that tribes must meet to be eligible to implement the statutory programs within their reservations. More specifically, in discussing the jurisdictional requirement, the rules that define the term "reservation" interpret it to include "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." TAR, 63 Fed. Reg. at 7258, App. 67a. *Accord* 56 Fed. Reg. at 64881; 58 Fed. Reg. at 67970, 67976. Thus, one of the main issues raised by petitioners – EPA's definition of "reservation" – is not unique to the TAR. The "treatment as a state" rules under the CWA and SDWA never were challenged in court.

Petitioners' other issue concerns EPA's finding that CAA §7474, App. 141a-146a, the redesignation provision, is one of the provisions for which it is appropriate to treat tribes as states under §7601(d)(2). Section 7474, added in 1977, already provided for tribal redesignation of reservations. The TAR extends this authority to "other areas within the tribe's jurisdiction," based on the language of §7601(d)(2)(B). The D.C. Circuit found that petitioners' attempt to argue otherwise "falls flat." 211 F.3d at 1295, App. 27a.

EPA's action in promulgating the TAR under the CAA, moreover, has nothing whatsoever to do with the taking of land into trust under the Indian Reorganiza-

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Reg. 39098 (Sept. 22, 1989) (proposed rule under CWA §518(e), regarding §§303, 401), 56 Fed. Reg. 64876 (Dec. 12, 1991) (final rule); 57 Fed. Reg. 8522 (March 10, 1992) (proposed rule under CWA §518(e), regarding §§308, 309, 401, 402 and 405), 58 Fed. Reg. 67966 (Dec. 22, 1993) (final rule); 52 Fed. Reg. 28112 (July 27, 1987) (proposed rule under SDWA §1451), 53 Fed. Reg. 37396 (Sept. 26, 1988) (final rule).

tion Act, 25 U.S.C. §461 *et seq.* ("IRA"), despite petitioners' attempts to confuse and commingle the two statutes. The taking of land into trust is subject not only to an entirely different statute but to an entirely different regulatory scheme, administered by the Department of the Interior, not the EPA. Part 151 of 25 C.F.R. establishes specific procedures for the taking of land into trust which require an opportunity for comment by states and local governments, 25 C.F.R. §151.11(d), and take a number of factors into account.[5] Petitioners' attempt to conflate these two statutes and regulatory schemes not only is incorrect but results in misleading and inaccurate statements and implications in petitioners' brief, which respondents are obliged to correct. Sup. Ct. R. 15.1. Once these misstatements are corrected, it is even more apparent that petitioners do not raise any issues warranting review by this Court.

First, the TAR does not permit tribes to regulate air quality over lands that would otherwise be subject to state jurisdiction, despite petitioners' implications to the contrary. *See* Pet. Br. at 2, 5, 12-13, 20-21. The TAR authorizes tribal regulation of air quality over trust lands (subject to the conditions set forth in the CAA and the rule itself). Trust lands have always been viewed as "Indian country" subject to tribal and federal – but not state – jurisdiction, as the D.C. Circuit recognized. 211 F.3d at 1294 (citing *United States v. John*, 437 U.S. 634 (1978); *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000); *United States v. Azure*, 801 F.3d 336 (8th Cir. 1986); *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985)), App. 25a; *accord, Oklahoma Tax Comm'n*

[5] For example, the distance of a parcel from existing tribal lands is one factor that can prevent the Secretary of the Interior from taking land into trust. 25 C.F.R. §151.11(b).

*v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). The question of whether a certain parcel of land should be taken into trust, pursuant to the IRA or by legislation, is an entirely different question which has nothing to do with the CAA and certainly not with the TAR.

Second, although there are certainly instances of checkerboarding within reservations, Pet. Br. at 3, this is far from true of all, or even the majority, of reservations. Of the approximately 16.5 million acres of reservation land that comprise the Navajo Indian Reservation, the Gila River Indian Reservation and the Salt River Indian Reservation (the reservations of three of the tribal respondents in this proceeding), less than 1% is fee land. Of the half million acres that comprise the Fort Hall Indian Reservation, occupied by the Shoshone-Bannock Tribes, the fourth tribal respondent, only about 4% is fee land. Moreover, the Gila River Indian Community, the Navajo Nation and the Shoshone-Bannock Tribes are among the few tribes which have received "treatment as a state" under §105 of the CAA, 42 U.S.C. §7405, which provides for grants for implementing tribal air programs. Because of the complexity of CAA programs and the lack of major sources in Indian country, it is unlikely that many tribes will submit Section 105 applications, at least in the foreseeable future.

Finally, trust lands typically are not miles from reservations, nor are they proliferating yearly. Pet. Br. at 13. A recent compilation of data on trust lands indicates 40 percent of all trust applications were *denied* in 1996.[6]

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[6] Fact Sheet issued by the Bureau of Indian Affairs, Division of Real Estate Services, June 25, 1997 ("BIA Fact Sheet") at 3, Respondents' Appendix ("R.App.") at A-1, A-5.

For the four-year period from 1992 to 1995, a total of 215,000 acres was taken into trust by the Secretary of the Interior, or an average of less than 54,000 acres a year, a portion of which was congressionally mandated and not subject to the discretion of the Secretary.[7] However, in 1996 alone, some 130,000 acres passed *out* of trust through sales to non-Indians, foreclosures, devise by testamentary instruments, and other similar means.[8] That tribes are now seeking to acquire more trust lands, largely to fulfill tribes' objectives of consolidating their former reservations by purchase and acquisition of non-Indian fee in-holdings, should be neither surprising nor cause for concern, despite the alarmist descriptions in petitioners' brief.

## REASONS FOR DENYING THE WRIT

Under the CAA, review of nationally applicable rules like the TAR may be heard only in the D.C. Circuit, so that there can be no conflicts within the circuits regarding the TAR. Petitioners' claim of a conflict with the Ninth Circuit regarding EPA's interpretation in the TAR of the term "reservation" is therefore unfounded. The Ninth Circuit was not even aware of the TAR at the time it issued the decision in question, and in fact remanded to EPA the question of whether certain lands constituted "reservation" under the CAA.

Petitioners' claim that the TAR divests states of their rightful jurisdiction is also unfounded. Tribes have always had regulatory jurisdiction over trust lands, to the exclusion of states; moreover, the TAR, by interpreting "reser-

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[7] *Id.* at 1, R.App. at A-2.

[8] *Id.* at 2, R.App. at A-3.

vation" to include such trust lands, reflects existing federal Indian law. Similarly, tribes have always had regulatory jurisdiction over their reservations, and under the "health and welfare" exception in *Montana v. United States*, 450 U.S. 544 (1981), tribes have jurisdiction to regulate air quality over non-Indian fee lands within their reservations as well. In addition, although the issue is not in fact raised by this case, there are significant restraints on the Secretary of the Interior's discretion to take lands into trust, as well as limits on a tribe's authority to redesignate small parcels of land. Finally, the TAR does not expand the impacts of tribal redesignations on states, since tribes had the authority to redesignate their reservations prior to the TAR, and the impacts of any such redesignations always could extend beyond reservation boundaries, due to the very nature of air quality regulation. The TAR does not, therefore, result in any extension of tribal jurisdiction.

The D.C. Circuit's decision also was correct on the merits, especially in light of the limited scope of review of EPA's rule. EPA's interpretation of the redesignation provision as extending to all areas of a tribe's jurisdiction is consistent with the CAA and entitled to deference. Likewise, EPA's interpretation of the term "reservation" is consistent with an extensive body of case law and is entitled to deference. EPA's interpretation of the CAA as a statutory delegation of regulatory authority to tribes within their reservations comports with the statutory language and purposes and with legislative intent.

## I.

## THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUES RAISED BY PETITIONERS.

As petitioners themselves point out, Pet. Br. at 12, there can be no conflict among the circuits regarding the TAR because the CAA provides for review of all nationally applicable rules and other final actions in the D.C. Circuit. 42 U.S.C. §7607(b)(1). Petitioners then turn around and claim that EPA's interpretation of "reservation" in the TAR, which the D.C. Circuit upheld, conflicts with the Ninth Circuit's decision in *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (1999). Pet. Br. at 21. In fact, the court in *Arizona* did not reach the question of what constitutes a reservation, nor did it consider any aspect of the TAR.

The *Arizona* decision involved a challenge to an EPA approval of a request from the Yavapai-Apache Tribe for redesignation of its reservation under CAA §7474, App. 141a. Petitioners in that case stipulated that a particular parcel of land (the "Middle Verde" parcel) constituted a reservation, but disagreed as to four other parcels for which the tribe sought redesignation. The *Arizona* court stated that there was "insufficient evidence in the record to support a finding that these parcels have been declared to be reservations . . . or . . . have been added to the Middle Verde reservation by proclamation." 151 F.3d at 1210. Petitioners argue that because the lands in question were trust lands, the court must have ruled that trust land may not be considered reservation land. In fact, however, the court refrained from making any ruling with regard to these parcels, instead remanding to EPA "to determine whether the parcels are reservations." 170 F.3d at 870.

It is also abundantly clear that the Ninth Circuit in *Arizona* did not consider EPA's interpretation of "reservation" in the TAR, since the court was unaware that EPA had promulgated the rule. *Id.* at 1212 ("EPA has failed to act as directed by Congress to promulgate [the TAR]").[9]

Moreover, the dissent, which would have reached a decision on the reservation issue, noted that EPA's determination that the land was part of a reservation was consistent with judicial precedent that trust lands may be considered reservation. The dissent then stated, "Given these decisions, the EPA's determination that the Tribe's lands were reservations is permissible and should be explicitly upheld." 151 F.3d at 1214. This statement is consistent with the D.C. Circuit decision below; indeed, the dissenting judge relied on two of the same cases cited by the D.C. Circuit.

## II.
## THE TAR DOES NOT RESULT IN AN ENCROACHMENT ON STATE JURISDICTION.

In an effort to justify the grant of a writ in this proceeding, petitioners attempt to elevate the importance of this relatively routine administrative rulemaking to the level of a crisis by misconstruing EPA's action as a dramatic departure from existing precedent and a significant threat to states. In fact, the TAR does not significantly alter the extent of tribal jurisdiction; rather, it reflects the existing state of federal Indian law. Moreover, the TAR does not expand the impacts of tribal air quality regulation: the very nature of air quality means that regulations will have impacts on bordering jurisdictions,

[9] EPA had in fact recently issued the rule, but for whatever reason this seems to have been overlooked by the court.

whether it be tribal impacts on states, state impacts on tribes, or state impacts on other states, as petitioners themselves point out. Pet. Br. at 14-15.

### A. The TAR Does Not Extend the Scope of Tribal Jurisdiction.

In the final analysis, the TAR does not give tribes jurisdiction that they would not have under existing precedent of this Court. Off-reservation lands held in trust for tribes have been determined by the courts to be "Indian country" under 18 U.S.C. §1151(a) ("all land within the limits of any Indian reservation"), and therefore subject to tribal (and federal) regulation. Petitioners claim that such jurisdiction will encroach substantially on states, but in reality there are adequate protections not only in the CAA and the TAR but also in the regulations controlling fee-to-trust transfers to ensure that states will not be affected unduly. Finally, tribal jurisdiction over air quality within a reservation's boundaries, including non-Indian fee lands, is consistent with this Court's precedent.

#### 1. Tribes have always had jurisdiction over trust lands.

Based on the precedent of this Court and enactments of Congress, it is indisputable that Indian tribes have regulatory jurisdiction over lands held in trust for them by the United States, regardless of whether those lands are inside or outside the boundaries of any "formal" reservation. In addition, this Court has specifically found that trust lands are equivalent to "reservation" under §1151-(a). Accordingly, EPA's decision to include those lands within the definition of "reservation" in the CAA is consistent with federal Indian law as interpreted by this Court.

Petitioners concede that tribal regulatory authority extends over "Indian country," and that this term is defined by §1151. Pet. Br. at 3. Section 1151 provides:

> "[T]he term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[10]

This Court has found that trust land, which significantly is not mentioned separately under any of the three categories in §1151, is equivalent to an "informal reservation" and thus included within §1151(a). Thus in both *Potawatomi Tribe* and *Sac & Fox Nation* the Court explained that for purposes of determining what is "Indian Country," there is no distinction between trust land and a formal reservation. In rejecting Oklahoma's claim that the state could tax sales to tribal members on trust lands that were not part of a formal reservation, the Court in *Potawatomi Tribe* stated, "[W]e ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' [*United States v. John, 437 U.S. 634*], at 648-649; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938)."[11] *Potawatomi Tribe*, 498 U.S. at 511. Eluci-

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[10] As petitioners note, Pet. Br. at 3 n.1, the definition applies to civil as well as criminal jurisdiction. *E.g., DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 952 (1998).

[11] There is no basis for attempting to distinguish lands taken into trust by the Secretary of Interior under 25 U.S.C. §465 and

[footnote continued]

dating the reasoning in *Potawatomi Tribe*, the Court in *Sac & Fox Nation* stated, "We noted that we have never drawn the distinction [between formal reservations and other lands held in trust] Oklahoma urged."[12] 508 U.S. at 125. Instead, in both cases the Court found the trust land in question to be "reservation" under §1151-(a) and subject to tribal jurisdiction. *Sac & Fox*, 508 U.S. at 123; *Potawatomi Tribe*, 498 U.S. at 511; *accord United States v. John*, 437 U.S. 634, 649 (1978); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 & n.8 (1997) (finding "tribal land" to include lands "held by the United States in trust for the Tribe").

Numerous statutes support the conclusion that Congress also considers trust land to be within a tribe's jurisdiction. For example, as the Court pointed out in *Sac & Fox Nation*, Congress in Pub. L. 280, 28 U.S.C. §1360, required some states to assume, and gave others the option of assuming, civil jurisdiction "in the areas of Indian country situated within such State." 25 U.S.C. §§ 1321(a), 1322(a). *See Sac & Fox Nation*, 508 U.S. at

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other trust lands, as petitioners attempt to do. Pet. Br. at 20-21. Whether taken into trust by Congress directly, or indirectly through the Secretary, trust land is "set apart for the use of the Indians as such, under the superintendence of the Government."

[12] Oklahoma, with its collection of "informal" reservations, is not the only state in which the limitation of tribal jurisdiction to only "formal" reservations would have a profound effect. In New Mexico, for example, many of the Pueblo lands date back to Spanish land grants and are not formal reservations despite predating the United States. They have nevertheless been considered reservations. *See United States v. Sandoval*, 231 U.S. 28 (1913); *see also Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (concluding that Pueblo's "powers inherent in Indian tribal sovereignty" were sufficient to give it regulatory jurisdiction over water quality on Pueblo lands, and construing the Clean Water Act accordingly), *cert. denied*, 522 U.S. 965 (1997).

125. It would be nonsensical for Congress to have given states the opportunity to assume something they already had. *See also* Indian Child Welfare Act, 25 U.S.C. §1903-(10) (defining "reservation" to include all Indian country under §1151 and any trust lands and Indian lands subject to restraints against alienation that are not already covered under §1151).

In the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.*, Congress wrestled with how much authority states should be *given* over the hotly contested area of Indian gaming on Indian lands. For the purpose here, it is most relevant that Congress started with the assumption that absent congressional action, tribes would have regulatory jurisdiction over their lands, including trust lands: "It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to *Indian lands*." S. Rep. No. 100-446, at 5, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. "Indian lands" are defined in the IGRA to include existing trust lands, 25 U.S.C. §2703(4)(B).

Finally, it is interesting to note that the State of Michigan, the lead petitioner before the Court, also recognizes tribal jurisdiction over off-reservation trust lands. For example, in a Michigan statute relating to Indian Housing Authorities, the definition of "Indian reservation" is illuminating: " 'Indian reservation' means an Indian community which has land held in trust for the Indian community by the federal or state government, or a local unit of government, or which owns the land in its own name." M.S.A. 5.2950(51)(b).

Both the precedents of this Court and enactments by Congress make it clear that lands held in trust for Indians by the United States are equivalent to "reservation," and are subject to tribal regulatory authority. Accordingly, tribes have always had the ability to regulate air quality on those lands, and the TAR is completely consistent with existing law in this regard.

### 2. Petitioners' Fears Regarding Off-Reservation Trust Acquisitions Are Baseless.

In their attempt to make this case appear worthy of granting the writ, petitioners paint a picture in which the Secretary of the Interior is taking far-flung lands into trust indiscriminately, without any curb on his discretion. There is simply no basis in fact or law for this portrayal.

First, the petitioners try to revive the bogeyman of an Eighth Circuit divided-panel decision in 1995. In *South Dakota v. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), the majority held that §5 of the IRA, 25 U.S.C. §465, App. 148a-149a, was an unconstitutional delegation of congressional authority because it lacked sufficient constraints on the Secretary's discretion. The court went so far as to comment that §465 "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." 69 F.3d at 878. This Court granted *certiorari* but then vacated the Eighth Circuit opinion and remanded in light of a newly promulgated regulation providing a thirty-day waiting period during which parties could challenge a trust acquisition approval. 519 U.S. 919.

*South Dakota* is simply irrelevant to this case. There is no trust acquisition that has been challenged. There is not even a particular piece of "IRA trust land" at issue that is upsetting the petitioners. It would be extra-

ordinary for this Court to grant *certiorari* because of a question that is *not* presented. Even if petitioners were right about the "horrors" of §465, the proper course would be to wait until the issue arises in a challenged trust land acquisition, not in a rulemaking by an agency that does not even administer the statute in question.[13]

The petitioners are not right, however, about the effects of §465. First, in a well-reasoned opinion, the Tenth Circuit found that the regulations implementing §465 provide sufficient "law to apply" so that judicial review is available. *McAlpine v. United States*, 112 F.3d 1429 (10th Cir.), *cert. denied*, 522 U.S. 984 (1997). This decision makes it appear likely that the delegation issues in *South Dakota* will be resolved without the need for action by this Court.[14]

Second, the regulations issued by Interior impose significant constraints on trust acquisitions for tribes, contrary to petitioners' claims. Pet. Br. at 20. For off-reservation trust acquisitions, the Secretary must provide notice to local and state governments giving them 30 days to comment, 25 C.F.R. §151.11(d). In addition, the rules provide:

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[13] Even were the delegation doctrine question presented here, there would be an additional reason for the Court's refusing to address the issue now. The BIA is expected to issue a revised 25 C.F.R. Part 151 within the next several months. *See* proposed rule, 64 Fed. Reg. 17574 (April 12, 1999). The final rule is almost certain to constrain the Secretary's discretion even further.

[14] A pre-*South Dakota* case, *Florida Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), had found judicial review unavailable and the Secretary's discretion unconfined. The *McAlpine* court's reasons for disagreeing with the *Florida Dep't of Business Regulation* case are compelling and presumably will be adopted by other circuits, including the Eleventh, that confront the issue.

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised [by state and local governments].

25 C.F.R. §151.11(b). Moreover, the Secretary must consider the statutory authority for the acquisition, the need for the land, the purpose of the acquisition, the tax impact on state and local government, resulting jurisdictional problems, the BIA's ability to discharge its responsibilities if the acquisition is made, and NEPA compliance. 25 C.F.R. §§151.11(a), 151.10(a)-(c), (e)-(h). These are real constraints on the Secretary's discretion and should put the petitioners' claims in perspective, especially since the regulations require increased scrutiny of applications for lands at a distance from reservations.[15]

Data bear out that petitioners' fears are baseless. As mentioned above, 40 percent of trust land applications were denied in 1996, the most recent year for which information is available.[16] For example, the Pascua Yaqui Tribe's application to have 23 acres in the Town of Guadalupe, Arizona taken into trust was ultimately withdrawn after the Town Council objected, even though the Tribe intended only to provide medical facilities and housing for tribal members, who make up 40 percent of

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[15] The IRA itself also imposes constraints on the Secretary's discretion. *See South Dakota*, 69 F.3d at 887-88 (Murphy, J., dissenting).

[16] BIA Fact Sheet, R. App. at A-5.

the Town's population.[17] Near Minneapolis, the regional director of the BIA denied a trust acquisition request by the Shakopee Mdewakanton Sioux Community after objections by state and local officials. As one of his reasons, the regional director explained that trust status for the land was not necessary for the tribe's economic health.[18] As a final example, the trust acquisition request at issue in *McAlpine* was denied in part because the land was not close to the relevant reservation and agency, and because there was insufficient justification for removing the land from local tax rolls. 112 F.3d at 1436-37.

While the BIA does not keep statistical data on whether trust applications and acquisitions are on- or off-reservation, these examples, coupled with the 40 percent denial rate and the regulatory factors, indicate that the petitioners grossly overstate their allegations regarding use of the Secretary's discretion to take land into trust far from reservations. While tribes understandably are eager to recover a small portion of the over 90,000,000 acres of trust land they lost between 1887 and 1934, *Cohen's Handbook of Federal Indian Law* 138 (Strickland *et al.* eds., 1982 ed.), the vast majority of successful trust acquisitions are non-controversial.

Thus, trust acquisitions for tribes are simply not a major concern, factually or legally. The petitioners' attempt to bootstrap a mundane rulemaking into a *cert*-worthy issue by using an inflated description of an issue the Court likely will never need to confront is neither appropriate nor persuasive. In fact, tribes gain modest

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[17] Betty Beard, *Guadalupe Dispute Ends*, ARIZONA REPUBLIC, October 16, 1999, at B1.

[18] Bill Gardner, *Tribe's Bid for Tax-Free Land Status Rejected*, ST. PAUL PIONEER PRESS, October 8, 1998, at 1B.

amounts of much-needed land through off-reservation trust acquisitions, and they have the right under federal Indian law to regulate that land. The EPA did nothing new in the TAR, and petitioners' protests to the contrary are misplaced.

### 3. Even without an express delegation, tribes would have jurisdiction to regulate air quality over non-Indian fee lands within their reservations.

EPA interprets the CAA as a statutory delegation of authority to tribes to regulate all areas within their reservations, including non-Indian fee lands. Even apart from this statutory delegation, however, tribes already have the inherent authority to regulate air quality within their reservations, under well-established principles of federal Indian law, discussed above. In addition, tribes most likely would have the inherent authority to regulate the air quality of non-Indian fee lands within their reservations, under the second exception in *Montana v. United States*. The CAA's statutory delegation obviates the need for tribes to demonstrate this inherent authority over fee lands under *Montana*, but does not as a practical matter extend the scope of a tribe's authority.

Reservations are one of the categories of "Indian country," *see* 18 U.S.C. §1151(a), and as such there is no question as to a tribe's inherent authority to regulate reservation lands for air quality purposes. When a tribe does not do so, the jurisdiction to regulate falls not to the states but to the federal government. Thus EPA provides in the TAR for federal implementation of CAA programs in instances where tribes are not already administering those programs. 63 Fed. Reg. at 7262-63, App. 85a-90a.

*See also* S. Rep. No. 101-228 at 80, 1990 U.S.C.C.A.N. at 3466 ("This provision also confirms the Agency's obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility"). There is therefore no room for state regulation of reservation land, regardless of the TAR.

Tribal authority over non-Indian fee land within reservations is, in contrast, limited. *Montana; see also Strate.* The Court in *Montana* provided two exceptions to this limit on tribal jurisdiction, however, the second of which controls here: the Court held that a tribe may exercise regulatory jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The regulation of air quality clearly falls within this exception.[19]

Indeed, it is difficult to imagine any matter subject to regulation that has a greater impact on the surrounding environs. If tribes are not able to ensure the "health or welfare" of their on-reservation members through regulation of air quality, it is hard to imagine what *would* qualify under the "health or welfare" prong of the second exception. The entire purpose of air quality regulation is health and welfare. Unlike zoning, air quality demands unified treatment over a geographic area. *Cf. Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408 (1989) (split decision allowing

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[19] The first exception – that a tribe has jurisdiction over a nonmember who has a consensual relationship with the tribe – may also be relevant in some instances where air quality regulation is concerned.

tribes to zone non-Indian lands within "closed," but not "open," portion of reservation).[20]

The delegation in the CAA therefore does not change the result regarding tribal regulation. As EPA itself points out,

> Even without this . . . direct grant of authority, Indian tribes would very likely have inherent authority over all activities within reservation boundaries that are subject to CAA regulation. The high mobility of air pollutants, resulting area-wide effects, and the seriousness of such impacts, would all tend to support Tribal inherent authority.

59 Fed. Reg. at 43958. *See also* EPA's Final Rule under CWA §1377(e), in which EPA states that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." 56 Fed. Reg. at 64878. The TAR therefore is not the radical departure from existing law that the petitioners would have the Court believe.

Nor is there any merit to petitioners' argument that this delegation divests states of their authority in violation of CAA §116, 42 U.S.C. §7416. In the first place, states never had the authority to regulate tribal lands, as discussed above. Equally importantly, even if CAA §7601(d) were inconsistent with §7416, it was enacted long after §7416 and therefore would supersede it. *E.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (1938 Mineral Leasing Act overrode 1924 Act); *Moe v. Confed-*

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[20] Only water quality may have a similar effect on the health or welfare of a tribe and, significantly, in its treatment as a state rule under the CWA, EPA found the Act to be "a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts." 56 Fed. Reg. at 64878. In other words, EPA implied that any *Montana* showing required under the CWA would be a mere formality.

*erated Salish and Kootenai Tribes,* 425 U.S. 463, 472 (1976) (jurisdictional provisions of 28 U.S.C. §1362 overrode restrictions of §1341). *See also United States v. Mazurie,* 419 U.S. 544, 554 (1975) (Congress may delegate authority to tribes "even though the lands [are] held in fee by non-Indians, and even though the persons regulated [are] non-Indians").

### B. The TAR Does Not Expand the Impacts of Tribal Air Quality Regulation on States.

Petitioners also complain that tribal redesignations of tribal land will affect development on state lands, but this is a result of air quality regulation in general, not a result of the TAR. Since the air is not confined by political boundaries, and because of the high mobility of air pollutants and resulting area-wide effects of such pollutants, *see* 59 Fed. Reg. at 43958, n.5, regulation by one jurisdiction will unavoidably have impacts on neighboring jurisdictions, as petitioners themselves recognize.

Indeed, the occurrence of interstate (and tribal-state) impacts from air quality regulation is specifically recognized in the Clear Air Act: the Act provides for the establishment of interstate transport regions and commissions, 42 U.S.C. §§7506a, 7611c(a) and visibility transport regions and commissions, §7492, to address just such transboundary impacts from air pollutants. In addition, the Act allows states to petition EPA to address the effects of pollution emitted from other states, §7426, and even provides for cooperation on international effects from air pollution, §7415. All the TAR does is to expand these provisions to apply to tribes as well as

states.[21] In doing so, the TAR makes clear that states are far from "powerless" to address transboundary impacts from tribes, Pet. Br. at 16, since these provisions establish mechanisms for states to work with tribes on such issues, just as they do with other states.

Moreover, petitioners need have no fear of tribes redesignating isolated parcels of land from Class II to Class I. First, before any area may be redesignated, notice must be provided and public hearings conducted in all affected areas and a description and analysis of the impacts of the proposed redesignation must be prepared. 42 U.S.C. §7474; 40 C.F.R. §51.166(g)(2). If there are any disputes between states and tribes regarding a proposed redesignation, the state or tribe may request the Administrator to conduct negotiations to resolve the dispute. §7474(e). In doing so, the Administrator must "consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area," *id.*, making petitioners' fears unlikely to occur.

Finally, it was the 1977 amendments to the CAA which allowed tribes to redesignate their reservations, under §7474(c). Section 7601(d) and the TAR therefore did not create this authority. The TAR simply clarifies that this tribal authority extends to all lands within a tribe's jurisdiction, which may extend beyond the boundaries of a formal reservation. By its own terms, states do not have jurisdiction over lands "within the tribe's jurisdiction." Moreover, states never had the authority to redesignate reservation lands, since such lands always were within Indian country, as defined by 18 U.S.C.

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[21] For example, the Grand Canyon Visibility Transport Commission established under §7492 was expanded to include tribal representation.

§1151, which even petitioners concede defines tribal jurisdiction. Pet. Br. at 3 and n.1. *See also* discussion in Part A above. There is therefore nothing unique about the TAR in this regard, nor does the TAR place any extra burdens on the states.

## III.

## THE D.C. CIRCUIT DECISION WAS CORRECT ON THE MERITS, ESPECIALLY IN LIGHT OF THE NARROW SCOPE OF REVIEW GOVERNING EPA'S ACTION AND THE DEFERENCE REQUIRED TO BE ACCORDED TO EPA'S INTERPRETATION OF THE STATUTE.

EPA's rulemaking is reviewable under the Administrative Procedures Act, 5 U.S.C. §706(2)(A). The D.C. Circuit therefore was required to uphold the TAR unless it found the rulemaking "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This is a narrow standard of review, under which the court is not empowered to substitute its judgment for the agency's, but must uphold the agency's reasonable decisions. *E.g., Baltimore Gas & Electric Co. v. NRDC,* 462 U.S. 87, 104-05 (1983); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). In addition, in reviewing EPA's interpretation of the CAA, the court correctly employed a *Chevron* analysis, which required it to accord deference to the agency where the statute was ambiguous. 211 F.3d at 1287, App. 54a, citing *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984). In light of these standards and the underlying reasonableness of EPA's action, the D.C. Circuit was correct in upholding the TAR.

### A. EPA's Interpretation of the Redesignation Provision and of the Term "Reservation" is Consistent with the Case Law and Principles of Statutory Construction and is Entitled to Deference.

Petitioners' contest EPA's interpretation of 42 U.S.C. §7474, the redesignation provision, as allowing tribes to redesignate areas of tribal jurisdiction outside formal reservation boundaries. Section 7474(c) states that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." As the D.C. Circuit stated, "[a]ll §7474(c) establishes, however, is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in nonreservation areas." 211 F.3d at 1295, App. 27a. EPA therefore looked to §7601(d)(2), the provision governing tribal authority under the CAA, and that provision specifically states that treatment as a state is authorized if "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation *or other areas within the tribe's jurisdiction*." (Emphasis supplied.) EPA therefore provided in the TAR that tribes have the authority to redesignate all lands "within the tribe's jurisdiction," provided they meet both the eligibility criteria in §7601(d)(2) and the redesignation criteria in §7474(c).

EPA's interpretation of the Act was perfectly reasonable, and also followed principles of statutory construction by harmonizing the provisions of the statute. *Commissioner v. Engle*, 464 U.S. 206, 217 (1984); *Commissioner v. Tufts*, 461 U.S. 300, 314 (1983). The D.C.

Circuit was therefore correct to uphold it. To the extent there is any ambiguity in the statute, moreover, the D.C. Circuit was required to accord deference to EPA's interpretation under *Chevron*. Petitioners urge the narrowest possible reading of §7474, but this violates the principle that "statutes should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *E.g., Montana v. Blackfeet Tribe,* 471 U.S. at 766.

Even if the language of §7474(c) were inconsistent with §7601(d), moreover, §7474(c) was added to the CAA in 1977, whereas §7601(d) was added in 1990. The jurisdictional language in §7601(d) would therefore supersede the language of §7474(c). *E.g., Montana v. Blackfeet Tribe; Moe v. Confederated Salish and Kootenai Tribes.*

Section 7474(c) would extend to trust lands in any event by virtue of EPA's separate finding that the term "reservation" includes trust lands outside formal reservation boundaries. Petitioners contend that the term "reservation" as used in the CAA is not ambiguous, and thus that EPA's interpretation is not entitled to deference. This argument is totally spurious, however, since the term is not defined anywhere in the CAA, and the "varying definitions of 'reservation' [in other federal statutes] lay to waste petitioners' argument." 211 F.3d at 1293, App. 24a. EPA's interpretation is supported by an extensive body of case law, as discussed in the D.C. Circuit's opinion.

### B. EPA's Finding of a Statutory Delegation Comports with Congressional Intent.

In the matter below, the D.C. Circuit found that:

> The [CAA]'s clear distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be per se within the tribe's jurisdiction. Thus, EPA correctly interpreted §7601(d) to express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation.

211 F.3d at 1288, App. 13a. The D.C. Circuit also found that this interpretation was confirmed by "the statute's . . . purpose, and legislative history." *Id.* at 1288, 1288-89, App. 12a, 13a-15a. In addition, as the D.C. Circuit noted, another federal court has observed that similar language in Clean Water Act §1377(e) regarding tribal jurisdiction over reservation land "seems to indicate plainly that Congress did intend to delegate . . . authority to tribes." *Id.* at 1291, App. 21a, citing *Montana v. EPA*, 941 F. Supp. 945, 951 n.10 & n.12 (D. Mont. 1996). This Court itself has suggested the same. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-28 (1989) (White, J., for the four-justice plurality). The D.C. Circuit thus had every reason to find that "EPA's interpretation comports with congressional intent." 211 F.3d at 1288, App. 12a.

The Ninth Circuit's decision in *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (2000), is not to the contrary. Although that court opines that certain language (the "notwithstanding proviso") may be read automatically as an express delegation, it acknowledges that other lang-

uage may also constitute a statutory delegation, and simply would require further examination. *Id.* at 1219. The D.C. Circuit conducted just such an examination, and found §7601(d)(2) to meet the requirements of a statutory delegation.[22] Moreover, the D.C. Circuit determined that EPS's finding of a statutory delegation was consistent with the purpose of the CAA to "ensure effective enforcement of clean air standards" and to discourage checkerboard jurisdiction within reservations, and also was supported by the legislative history. 211 F.3d at 1288-89, App. 13a-15a. *See also* 63 Fed. Reg. at 7254-55, App. 54a-55a (interpretation of §7601(d) as delegation is supported by territorial approach in CAA to air quality regulation and by legislative history); *cf.* 56 Fed. Reg. at 64878 ("because of the mobile nature of pollutants in surface waters . . . it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on triabal portions"). In *Bugenig*, the court found no support for a delegation in the purpose or legislative history of the statute in question. 229 F.3d at 1215.

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[22] The court in *Bugenig*, in contrast, was faced with a statute that "contains no explicit authorization of jurisdiction, but simply incorporates by reference tribal documents," *id.* at 1219, and thus "does not even reflect on its face any congressional consideration of the proper scope of tribal authority." *id.* at 1218; *see also id.* at 1215 ("The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe").

## CONCLUSION

The TAR reflects a reasonable interpretation of the CAA, is consistent with existing federal law and raises no issues of extraordinary importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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December 11, 2000

## RESPONDENTS' APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

[SEAL]

## CORRECTED FACT SHEET

This corrected fact sheet corrects the figures used in question eight of the fact sheet prepared by the Bureau of Indian Affairs, Division of Real Estate Services, dated June 20, 1997, and revises question six.

**1. How many acres are held in trust or restricted status on behalf of Indian tribes and individuals?**

Nationwide there are approximately 54 million acres of land held in trust or restricted status. This data was obtained from the Bureau of Indian Affairs' (BIA) Annual Report of Indian Lands published in September 1985.

The BIA is currently in the process of compiling the Annual Report of Indian Lands for 1996. This report should be completed by September 1997. Preliminary computations from data furnished by the BIA's 12 Area Offices indicate that for the period 1985, the date of the BIA's last Annual Report, to the end of calendar year 1995 that there was an increase of approximately 2.7 million acres nationwide of trust lands over a ten year period. For the ten year period, this approximates 270,000 acres per year. This figure includes trust acquisitions that were congressionally mandated.

**2. What is the difference between land held in trust for a tribe or individual Indian and land held in a restricted status for a tribe of individual Indian?**

The title to trust land is held by the United States of America for the use and benefit of the tribe or individual Indian. Legal ownership of the title is vested with the United States and is not subject to taxation.

The title to restricted land is held by the tribe or individual Indian subject to the restriction that it cannot be alienated or encumbered without the consent of the Secretary. Legal ownership of the title is with the tribe or individual Indian and in a majority of the cases is subject to taxes, i.e. gross production taxes on oil and gas derived from restricted lands owned by the Osage and Five Tribes of Oklahoma (Choctaw, Chickasaw, Cherokee, Creek and Seminole).

**3. How many acres has the Secretary taken into trust during the past four years?**

For the period 1992 through 1995, the Secretary accepted title to approximately 215,000 in trust nationwide for Indian tribes, and includes acres which were congressionally mandated. This computes to approximately 55,000 acres per year. Because the BIA does not maintain records based on the location of the acquired land in relation to the boundaries of the Indian tribes' reservations, we are unable to provide a breakdown of these acres located on or outside the exterior boundaries of the reservation.

**4. How many acres of land were placed in trust during 1996?**

Although the 1996 Annual Report of Indian Lands is in the process of completion, preliminary figures indicate

that during 1996 that the amount of trust land acquisitions are similar to prior years. However, it is important to point out that approximately 10,000 of the acres acquired in trust in 1996 were congressionally mandated.

**5. How many acres of trust land were removed from trust status during calendar year 1996?**

Although the 1996 Annual Report of Indian Lands is in the process of completion, preliminary figures indicate that approximately 130,000 acres lost its trust status and became subject to state and local taxation. These lands were lost from trust status due to sales to non-Indians, individual Indians taking a patent-in-fee on their land and, thus, removing the trust status, foreclosures on mortgages of trust land and probates where non-Indians who are not entitled to hold land in trust have inherited by law or devise trust land. It should be pointed out that this acreage loss is only for 1996 as we did not include acres disposed of out of trust for the previous ten years because they were not readily available.

**6. How many acres during the last ten years have been taken into trust annually?**

The amount has remained fairly stable and averages approximately 250,000 acres per year. If this amount were divided equally among the total number of tribes, approximately 550, each tribe would have acquired approximately 450 acres per year. Although Congressman Istook refers to Indian tribes in total, we excluded the Alaska tribes because they had no applications. Their are approximately 330 Indian tribes in the continental United States. Each tribe would have to acquire approximately 757 acres per year to meet this average. However, all tribes do not apply each year, and some tribes are landless.

**7. How many acres of trust land have been lost between enactment of the General Allotment Act of 1887 and the Indian Reorganization Act of June 18, 1934?**

Between 1887 and 1934, over 90 million acres passed out of Indian ownership under the allotment policies of the General Allotment Act. The increase of the trust land base of approximately five percent between 1985 to 1996 is minimal when compared to the acres lost to the state and local taxing jurisdictions during the period between 1887 and 1934. Trust acres have and will continue to be removed from trust status for the reasons explained in Question No. 5.

**8. What does the 700,000 acres cited in Congressman Istook's letter dated June 9, 1997, represent?**

In March 1997, Congressman Istook requested the BIA furnish him with a report on all the fee-to-trust acquisition applications currently pending before the BIA. The report reflects the name of the applicant, date the application was received by the BIA, tribal affiliation, whether or not the acquisition is an individual Indian or tribe, county and state in which the land is located, approximate acres, and whether or not the land is located on or off the reservation.

By letter dated May 7, 1997, the BIA furnished Congressman Istook the requested report. Information prepared by the office of Congressman Istook totaled the acreage figures reflected on the report and made the statement "The BIA is now placing over 700,000 acres into trust." This statement could lead to a mis-impression that all 700,000 acres will automatically be placed in trust. The acreage figures provided him represents *application acres* and **not** *acres accepted into trust*. Each fee-to-trust application is unique and must be evaluated on its own merits

and a decision rendered by the Secretary to approve or disapprove the application based on the criteria found in 25 CFR 151. The mere act of filing an application does not in itself mean that the land will be placed into trust status.

Additionally, the BIA Navajo Area Office reported that they had *no* fee-to-trust acquisitions applications; however, they did report that they may have "potential" acquisitions of approximately 482,015 acres. This figure was included in Congressman Istook's report even though the Navajo Area Office does not have any pending fee-to-trust acquisition applications. In hindsight, the Navajo Area Office should have reported no pending fee-to-trust acquisition; however, in an effort to be responsive to the congressional inquiry, they submitted the "potential" acquisition applications. There is no certainty that these "potential" acquisitions will come to fruition as applications.

If you subtract the "potential" acquisitions reported by the Navajo Area Office, from the nationwide 700,000 acres reported by Congressman Istook, the nationwide acreage figure drops to approximately 275,000 acres. When this figure (275,000) is broken down between on and off reservation, the approximate number of acres located within the exterior boundaries or "on" the reservation is approximately one-half of the total.

Preliminary figures for the 1996 Annual Report of Indian Lands indicate that the BIA disapproved 40 percent of the applications it received. If this disapproval rate is applied to future applications covering the 275,000 acres, then, only approximately 110,000 acres will be placed in trust.

**PREPARED BY:** Bureau of Indian Affairs, Division of Real Estate Services
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